

**COMMITTEE ON RULES OF PROCEDURE  
IN DOMESTIC RELATIONS CASES**

Friday, October 1, 2004 10:00 am – 3:00 pm

Arizona Courts Building

1501 W. Washington, Conference Room 119

Teleconference #: (602) 542-9006

Web Site: <http://www.supreme.state.az.us/drrc/>

**Members Present:**

Hon. Mark Armstrong

Annette Burns, Esq.

Hon. Norm Davis

Annette Everlove, Esq.

Elaine Fridlund-Horne, Esq.

Bridget Humphrey, Esq. (telephonically)

Hon. Michael K. Jeanes

Phil Knox, Esq.

Janet Metcalf, Esq.

Hon. John Nelson (telephonically)

Robert Schwartz, Esq.

Debra Tanner, Esq.

Dr. Brian Yee

**Members Not Present:**

Hon. Dale Nielson

Richard Scholz, Esq.

Hon. Nanette Warner

**Staff Present:**

Konnie Neal

Theresa Barrett

Isabel Gillett

**Guests**

Jennifer Greene, Esq., AOC

Janet Sell, Esq., Office of the Attorney General

Valerie Sheedy, Esq., Private Practice Attorney

**Quorum:**

Yes

**1. Call to Order: Hon. Mark Armstrong**

After welcoming Committee members and determining a quorum, Judge Armstrong reviewed the new materials contained in the meeting packet:

- Agenda
- Membership List
- Workgroup List
- Workgroup Contact Information List
- 2004/2005 Meeting and Presentation Dates
- AOC Internet Page for the Committee on Rules of Procedure in Domestic Relations Cases
- Goals and Mission Statement
- Administrative Order No. 2003-104 and Membership List for the Keeping the Record Committee
- Memorandum from Philip Brown of the Office of the Attorney General Regarding Title IV-D Child Support Cases
- Mission Statement and Organizational Chart for Department of Economic Security
- Summary Memorandum from the Office of the Attorney General Regarding Title IV-D Child Support Cases
- Sanctions and Contempt Section Draft from Janet Sell
- Index for the *Arizona Rules of Family Law Procedure (ARFLP)* Draft Binder
- Updated Sections of Master *Arizona Rules of Family Law Procedure*
- Minutes from September 10, 2004: Judge Armstrong asked for a motion to approve the minutes at this time.

**Motion: Minutes Approved.  
Seconded**

**Vote: Minutes Approved.**

**2. Keeping the Record Committee Report –**

**Hon. Michael K. Jeanes (Clerk of the Superior Court in Maricopa County) and  
Jennifer Greene, Esq. (Administrative Office of the Courts)(AOC)**

Jennifer and Michael reported on the progress of the Keeping the Record Committee; they provided a copy of the Administrative Order establishing the Committee, as well as the membership list. This Committee meets monthly and has been meeting since January, 2004, and will continue meeting for approximately another six to eight months. The KTR Committee anticipates providing an interim report on court reporting to the Arizona Judicial Council at the December, 2004 meeting.

The committee has two workgroups at this time:

- Standards Workgroup – Michael is the chair for this workgroup. They are looking at standards that might be established for transcript formats, transcriber certification, and minimum standards for recording equipment.
- Rules and Statutes Workgroup – This workgroup is identifying statutes and rules that, because of their wording, would restrict a court from using electronic recording equipment. This is a very slow process. Jennifer said they do not see any impact on the DR Rules Committee’s work. They provided a list of proposed changes/revisions for civil rules. These changes mainly delete references to the word “stenographic” and also insert the word “certified” before a reference to court reporters.
  - ⇒ Rule 16 – Pretrial Conference
  - ⇒ Rules 30 and 31 – Depositions and video tape depositions
  - ⇒ Rule 43 – Witness Evidence
  - ⇒ Rule 51 – Jury Instructions
  - ⇒ Rule 74 – Arbitration Rules

Michael stated that the Standards Workgroup had a lengthy discussion as to whether a process should be created by which transcriptionists would be certified, similar to court reporters. The recommendation of the workgroup was to have a process where individuals would be qualified and meet certain qualifications through an RFQ process administered by the AOC.

Another issue discussed was regarding when the equipment is used and who should run it. The conclusion of the workgroup was that they should not designate within code or within rule who should run the equipment as it varies from jurisdiction to jurisdiction, and from limited jurisdiction and general jurisdiction courts. However, whoever runs the equipment must have a certain level of training to make sure the court has a quality report of the proceedings.

Michael reported that Jennifer has been doing a great deal of research on other states and how they deal with this issue and has found some fascinating materials from Wisconsin and California. It is an issue that is of primary interest to courts across the country at this time.

Judge Armstrong asked Jennifer and Michael if they would give this Committee copies of the Civil Rules to which they are making proposed changes. Jennifer stated that it is very preliminary at this point, and the Committee is not sure they will propose these changes. However, she asked the DR Rules Committee to be mindful of this “phenomenon” when rules are drafted that reference making a record and avoid something that would lock us into the traditional stenographic reporting technique. Judge Armstrong stated that the DR Rules Committee has used broad language that would capture all electronic equipment that is used presently and that will be used in the future. He said if the Keeping the Record Committee decides to propose these changes, the DR Rules Committee would need copies of those changes in order to be consistent with the changes this Committee makes in the Family Law Rules. Jennifer stated that she would do this.

### 3. **Court Interviews of Children – Dr. Brian Yee**

Dr. Yee reported on *ARFLP* Rule 10. He informed the members that at the August, 2004 Domestic Relations Committee (DRC) meeting, a Maricopa County family law attorney indicated that there are four judges on the family court bench of the Superior Court in Maricopa County who routinely interview children in custody cases. Dr. Yee stated that this surprised him as well as the other members of the DRC, because most of the judicial officers with whom he works would rather not interview children and feel that there are other less intrusive ways of getting information about the children's wishes than to do an in-chambers interview. The attorney also stated that these judges often times do not make a record of what was discovered in the interview. This means that there is a fact-finder/decision-maker who is making decisions on information that is not subject to examination by anyone else. Two other attorneys on this committee confirmed this information.

The legislator co-chairs for the DRC committee immediately spoke about revising A.R.S. § 25-405(a), which is the statute that pertains to judges being able to interview children in-camera for the purpose of ascertaining children's wishes. Dr. Yee shared with the DRC members that this Committee is working on this issue, and he gave them a copy of the draft of *ARFLP* Rule 10. The legislators concluded that they did not need to consider legislation at this time after all, because the issue is being addressed by the DR Rules Committee.

Dr. Yee stated that there is a controversial aspect of *ARFLP* Rule 10 as it is written, which is the issue of "presumptive sealing." At this time, 45 states consider the wishes of the child in their custody determination. In several of these states, the child's wishes prevail. In only two states is the record presumptively sealed. Dr. Yee suggested that Workgroup 2 might wordsmith this issue before the draft is finalized. Discussion ensued.

Judge Davis stated that when judges do interview the children, they want to do so in a manner that protects the children. Judge Armstrong suggested that it can be indicated that the record of the interview may be sealed based upon good cause and the best interest of the child. The decision of the Committee was that Judge Davis and Dr. Yee will work on a draft and comment and get their finished product to Konnie prior to November's meeting.

**TASK: Judge Davis and Dr. Yee will work on a draft and comment and e-mail their finished draft to Konnie prior to the November meeting. [Judge Armstrong and Konnie have revised Rule 10 to reflect the recommended changes discussed at the meeting.]**

### 4. ***ARFLP* Updates – Konnie Neal**

Konnie walked the members through the organization of the document, the presentation timelines to committees, and the approval process in general; she also reviewed the Goals and Missions Statement. Konnie suggested that it is critical that the titles and language of the sections are reflections of the content of each section. Annette Burns suggested changing the word "Simplified" in Section V: "Simplified Proceedings: Default, Consent Decree, and Voluntary Dismissal." The Committee changed the title to "Defaults, Consent Decrees, and Voluntary Dismissals."

**5. Follow-up on IV-D Disclosure Issue –**

**Debra Tanner and Janet Sell, Office of the Attorney General**

Debra and Janet discussed the conclusions of the IV-D staff in the Attorney General's Office regarding the IV-D disclosure issue. Judge Armstrong stated that this discussion would not be limited to IV-D disclosure issues but all IV-D issues.

Debra brought up the service issue, because her office has process servers who are sometimes unable to serve a party. When that happens, her office sends the case to the Office of Special Investigations (OSI), which is part of Department of Economic Security (DES). These investigators go into the field and locate the party who needs to be served. Debra proposed to change the Rule so that the OSI may serve the party once they have located that party.

Debra said that 30% of their cases are quashed. They are looking for ways to improve that rate and the efficiency of the calendar in order to move these cases along. At the present time, the Rule does not allow a "party" to serve the documents. In these cases, it is the State who is bringing the action as DES. The staff members of the OSI are DES employees, and are, therefore, not qualified to serve the documents. The reason behind this Rule is to insure that a party who has an interest in the outcome of the case does not serve the document.

Debra said the OSI does not have an interest in the outcome of these cases and asked if the Committee would be willing to consider the proposed Rule 4.1, allowing that office to serve the documents when they have located the party concerned. Janet stated that it was their intention that these investigators have the same training and be registered as process servers. Discussion ensued. The Committee approved making the changes to the Rule.

At this time, Janet spoke about the disclosure issue, and whether Rule 51 was going to have an exemption for the IV-D program. She stated that the conclusion of the attorneys at the Attorney General's Office was that most information in regard to establishing child support should come from the parents.

Janet listed some documents that can be disclosed and others that cannot:

- A copy of the Paternity Application in a 26.1 statement. When there is more than one potential father, they will add this fact in the application, but will not disclose his name.
- A copy of the Affidavit of Financial Information. Janet said that because this information belongs to the party, and that party has an affirmative duty to disclose it to the other party and the State, she feels it does not really add much.

- A copy of the IV-D Application. Janet explained that the State only gets a IV-D application when a party applies for services, rather than in cases that were initially initiated by computer interface because there were welfare benefits. Approximately 25% of their cases are non-public assistance cases. She said that once the State receives the application, the information included has already been passed on to the other party, and therefore, does not assist in establishing child support. The application does contain the Social Security number, and she feels this would be an issue regarding disclosing the application. There is no financial information in the application.
- Access to the information included in the DES Guide System. This system is created by the filing of reports by employers to unemployment insurance. Every quarter anyone who pays wages and has unemployment insurance must report the total amount of wages paid. The Federal law requires that the State have access to this data base but limits what information the State may use from this system. The State is not allowed to publicly disclose it; however, if a party fails to appear, the State may use it as a basis on which to attribute income. The State cannot disclose it as an exhibit in a hearing. If a party is not completely honest about his or her income, the State may use the data base to confront the party.
- Amount and duration of public assistance. The State considers this information to be confidential pursuant to A.R.S. § 41-1959, and the State does not believe it is relevant to establishing child support. The State needs to determine how much of the total amount of arrears that were calculated under the Guidelines belongs to the State and how much belongs to the custodial parent. This is based on time periods because it is the time periods that create the assignment of rights to the State. The State believes that disclosing information on a routine basis is neither necessary nor appropriate.

Janet stated that there is a wide misconception that the State has access to tax information. This is not correct. The State only has access to unemployment information. Janet asked for questions and discussion ensued wherein the members of the Committee spoke of their individual reasons for needing information from the State. Judge Armstrong stated that the current Rule does not exempt IV-D; therefore, the State should prepare a draft to change this Rule and submit it to the Committee.

## 6. Reports from Workgroups

### **Workgroup 5: Disclosure and Discovery (Judge Nelson, Chair)**

Judge Nelson and Janet Metcalf reported on changes made to this section at the request of the Committee members:

1. Added (f), (g), and (h) to Rule 53 – Disclosure of Witnesses; Disclosure of Expert Witnesses; Continuing Duty to Disclose
2. Added Rule 54 – Complex Case Disclosure

Janet added Rule 54. She stated that Rule 53 was the simple disclosure rule drafted by Judge Davis. She suggested adding the complex forms that had been prepared by Bob Schwartz and Valerie Sheedy. Discussion ensued. Janet said that only one of the rules should be used. Judge Armstrong suggested that a time limit needed to be added.

Annette Everlove suggested adding a new subsection (d) to Rule 53, which would deal with attorneys' fees and expenses: if either party has requested an award of attorneys' fees or costs, both parties shall submit a Spousal Financial Affidavit. She also suggested that this information should be repeated in subsection (b), that as a minimum disclosure, the parties shall provide proof of income.

Judge Armstrong asked Konnie and Annette Everlove to work on language during the lunch hour.

**7. Break for Lunch**

**8. Reports from Workgroups, Continued**

**Workgroup 10: Sanctions and Contempt (Judge Nelson, Chair)**

Janet Sell reported on the revisions for this Rule. She stated that there were two versions of seesaw rules in the material. One version had been drafted by Janet Metcalf and Judge Nelson. Another version was done by Brooke Sams, and this version is located in the Post-Judgment Proceedings section (which is now part of Sanctions and Contempt). The workgroup discussed the two different versions, and decided that Brooke's version was closer to Arizona Law; therefore, this version was chosen. Janet said she thought Brooke had blended together A.R.S. § 25-681, which is the statute for Child Support Arrest Warrants, and Civil Rule 64.1, which deals with civil arrest warrants.

The workgroup drafted their version of the Rule, which included Brooke's draft in terms of the Civil Arrest Warrant portion. It has some references to the Child Support Arrest Warrant, but in large measure, it cross references back to the applicable statute. They did not think it necessary to repeat the statute.

The workgroup added a Rule in response to Judge Armstrong's request about making Review Hearings mandatory when someone is incarcerated for contempt. Most of the Rule deals with Warrants, and the last paragraph is a Rule regarding Review Hearings.

Janet stated that they added language to the Review Hearing Rule which states that a Review Hearing is required in not less than 35 days. Judge Armstrong had suggested 30 days. The workgroup chose 35 because Maricopa County has very structured IV-D calendars. If a case is heard on a IV-D calendar, it is set on a particular day, given whose case it is. The hearings are always set on the same day. If the Rule is 30 days, then the Review Hearings must be held in four weeks. If there is a Monday holiday, then the Hearing is held in three weeks. If the Hearing is set at 35 days, the court has an option of doing 28 days or 35 days, which gives the court more flexibility.

Judge Armstrong asked where contempt was addressed in this Rule. He stated that this version of the Rule only addresses Warrants and Review Hearings for Contempt, but not contempt itself. Janet stated that there is nothing in the Rules now that address contempt.

Judge Armstrong suggested that in Section (d), “bond and purge” should be changed to “bond and release amount.” He also stated that he wants the Review Hearing every 30 or 35 days, as long as the person remains incarcerated, so that no one would fall through the cracks.

The consensus of the Committee was that this Rule would be substituted for Janet Metcalf’s proposal, and that there was no need to restate the contempt process. The title will be left as is, unless something is added regarding contempt to this Rule.

Discussion ensued regarding “warning language – failure to appear at the hearing.” The Rule was not specific, and Janet Sell asked if specific language should be added. The consensus was not to include this language.

#### **Workgroup 7: Pretrial and Trial Procedures (Judge Nielson, Chair)**

Annette Burns reviewed this draft. She stated that the changes the Committee had asked to be made at the September meeting had been changed. The only new provisions were:

1. A (10). Changed “will be completed” to “has been completed.”
2. Subsection E was added regarding giving the court discretion to set a Pretrial Conference.

Annette asked whether or not to include a Pretrial Statement form, which was discussed at the last meeting. Judge Armstrong reminded the members that at the September meeting regarding forms the decision was made by the Committee to refer to a web site where forms that can be filled out online will be available. He said he is asking the Supreme Court to prepare that web site and to make sure that the forms can be filled out online. This allows for more forms than the Committee had previously thought possible.

Judge Davis stated that there is a need to have a way to dismiss a case when there is no activity after a certain time. He said Rule 38.1 does that now, and the Supreme Court is looking at this Rule at the present time. Judge Davis also said that there had been several discussions regarding whether or not to set rule. Annette stated that this Rule does take into account part of the *Review of the Family Court Department of the Maricopa County Superior Court* Report by Greacen & Associates, LLC, that recommended that the active and inactive calendars be abandoned. However, she was not aware that there had been a suggestion that the Motion to Set itself be changed to a different procedure. Judge Davis said that it needs to be left both ways to allow flexibility for the counties that handle this differently. Annette and Judge Armstrong agreed with this. Discussion ensued regarding a timeline as to when the court may dismiss the case. The consensus was that a provision was needed for dismissal for lack of service and also one for lack of prosecution. The Motion to Set will be included with four months to file and two months notice to dismiss.

Judge Armstrong asked for volunteers to assist Annette to draft these two provisions. Phil Knox said that there are people in the Maricopa County Family Court Administration who would be helpful and that he would meet with Annette to give her names and phone numbers. Judge Armstrong asked that the final draft be reviewed by Judge Davis and Judge Warner before bringing it to the Committee.

**TASK: Annette Burns and employees from the Maricopa County Family Court Administration will draft two provisions for dismissal for lack of service and for lack of prosecution. Judge Davis and Judge Warner will review the draft before it is presented to the Committee.**

**Workgroup 8: Judgments (Phil Knox, Chair)**

Phil stated that the workgroup has had one telephonic conference meeting and learned that another group had addressed Rules 54 (new Rule 49) and 55 (new Rule 48). Michael stated that current Civil Rule 58(e) has a pending change before the Supreme Court. This Rule allows the distribution of minute entries by means other than mail. There are also some minor wording changes to the bottom of the paragraph concerning judgments. Judge Armstrong asked Michael to e-mail the version he has to Konnie, and it will be added to the draft.

**TASK: Michael will e-mail the proposed Civil Rule 58(e) with the changes pending before the Supreme Court. Konnie will include this in November's draft.**

The following provisions were removed:

1. Rule 58(g) – Entry of Judgment – the court does not use this Rule.
2. Rule 58(f) – Entry of Judgment in Habeas Corpus Proceedings – UCCJEA language has been added elsewhere.

The members discussed Rule 59; however, Phil explained to the members that the document that was in their binders was not his final draft.

Judge Davis commented on the “good cause” standard. He stated in volatile cases, having a good cause standard could lead the parties to make motions for new trials, because in highly emotional cases, good cause is any and everything. In Rule 59(i) (publication), there is a need for the court to get back into those judgments if there has been abuse of the publication standards. He would like to keep the good cause standard tight in the acrimonious cases, i.e., a 15-day time period. On the publication standard, he would want it to be loose enough to cover any cases where there were abuses for lack of effective service. He said he would be in agreement to keep all of the applicable specific reasons that apply for granting a new trial, and also keeping good cause for publication.

Judge Armstrong agreed with Judge Davis to include the specific reasons in Rule 59(a) that apply to a non-jury family court case. He said he does not want to evaluate based on a good cause standard. The members concurred. Judge Armstrong asked Phil to send the electronic version of the updated Rule 59 to Konnie by Monday and Konnie will add it to the draft. Judge Armstrong and Konnie will then review the current Rule 59(a) and delete the grounds that do not apply.

**TASK: Phil will send the electronic version of the updated Rule 59 to Konnie by Monday and Konnie will add his document to the draft. Judge Armstrong and Konnie will review the current Rule 59(a) and delete the grounds that do not apply.**

**Workgroup 9: Post-Judgment Proceedings (Judge Davis, Chair)**

Annette Everlove reviewed local rules and some of the State rules and culled together the most widely applicable portions of the Pima County Local Rules, Mohave County Local Rules, and some from Maricopa County and other jurisdictions.

Annette stated that there needs to be a separate section that clearly describes disclosure requirements for post-decree hearings, and that there needs to be some work done on contempt. She said that she would plug in what she thinks should be the appropriate disclosure requirements for the various post-decree matters for the November meeting.

**TASK: Annette will add the appropriate disclosure requirements for the various post-decree matters and have them ready for the November meeting.**

Judge Armstrong questioned Annette about her thoughts on contempt. He said that it was initially in a separate section because there can be both pre- and post-decree contempt. Annette said that it needed to be made clear that in a post-decree contempt action, a violating party needs to bring financial information to the Hearing in order to show that his/her lack of payment is not willful. Judge Armstrong stated that there should be specific contempt provisions for post-decree.

**TASK: Annette will add a contempt provision specific to post-decree.**

Under (j), the language “of hearing.” should be added at the end of the sentence. Annette also stated that there needs to be a different time of disclosure at an Evidentiary Hearing where there will be witnesses. She said that in the Request for Hearing form (which was changed to “Notice of Hearing”), there should be lines for the judge to add the time for disclosure, as it will back up to the date of hearing. Annette will draft proposed language.

**TASK: Annette will draft a provision for a time for disclosure at an evidentiary hearing with witnesses.**

Discussion ensued as to whether to use an Order to Appear form or a Notice of Hearing form. Judge Armstrong stated that he would like to see some attorneys working on this draft. Elaine said that she would be willing to share a Coconino County Notice form that provides information to the parties. It is served with every Petition for Modification. Another form they have is a Findings and Order form, where the court makes a finding under A.R.S. § 25-411, then either denies the motion or grants the motion and sets a case management to determine if discovery or an evaluation needs to be done, after which a hearing is set. Discussion ensued.

Judge Armstrong asked the attorneys present to speak to other attorneys as to whether the appropriate process is an Order to Appear process, or a Summons and Complaint process.

**Workgroup 11: Family Court Forms (Bridget Humphrey, Chair)**

Bridget was not present to give a report.

**9. Call to the Public – Judge Armstrong**

There were no members of the public present.

**10. Next Meeting – Konnie Neal**

The next Committee meeting will be held on **November 12, 2004**, at the Arizona Courts Building, 1501 W. Washington, Conference Room 230, Phoenix, Arizona from 10:00 am to 3:00 pm. The conference call number is: 602.542.9006.

**11. Adjournment**

Judge Armstrong adjourned the meeting at 2:10 pm.